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December 4, 2018

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Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

Federal Communications Commission  
Office of the Secretary

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*Via Electronic Filing*

**Re: Notice of Ex Parte Communications, GN Dkt. No. 18-231, Marketplace Report; WT Dkt. No. 18-203, The State of Mobile Wireless Competition; MB Dkt. No. 17-214, Status of Competition in the Market for the Delivery of Video Programming; MB Dkt. No. 18-227, Status of Competition in the Marketplace for Delivery of Audio Programming; IB Dkt. No. 18-251, Satellite Communications Services for the Communications Marketplace Report**

Dear Ms. Dortch:

On Friday, November 30, 2018, Sarah Morris, Deputy Director of New America's Open Technology Institute (OTI), and Joshua Stager, Senior Policy Counsel at OTI, spoke by phone with Travis Littman and Elizabeth McIntyre of Commissioner Rosenworcel's office. During that meeting, OTI made the following presentation regarding the Commission's draft Communications Marketplace Report (Report), which is scheduled for a vote at the Open Meeting on December 12, 2018.

As longtime proponents of sound data-driven policy making and advocates for improvements to the Commission's Form 477 data collection processes, OTI is particularly concerned about methodological issues in the Report, as well as assumptions on which the Commission continues to rely in making conclusions about the state of competition in fixed broadband markets. Although OTI recognizes the tight statutory deadlines imposed under the RAY BAUM'S Act, OTI urges the Commission to refrain from adopting the item until the following concerns are addressed.

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## Methodological Flaws

In its evaluation of competition in the fixed broadband marketplace, the Commission relies almost entirely on Form 477 data, which are self-reported data submitted by broadband providers about the census blocks in which those providers are able to deploy. As OTI and others have long told the Commission, this data set is fundamentally insufficient for measuring competition in the broadband marketplace.<sup>1</sup> Under Form 477, providers are merely required to report census blocks that they *could* serve without spending significant resources. This results in a deeply flawed data set that reports many census blocks as being served by multiple providers when, in reality, they are served by one or even zero providers. As a result, Form 477 data likely overstates the availability of broadband service and cannot be relied upon to identify competitive areas. By relying on this flawed data set, the Commission risks presenting to Congress a report that is deeply out of touch with the reality of the marketplace.

The Commission has acknowledged Form 477's insufficiency for measuring competition. Indeed, even in the recent Internet Access Services Report, the Commission includes a caveat about the limitations of Form 477 data, clearly stating that the data "does not necessarily reflect the number of choices available to a particular household and does not purport to measure competition." At the very least, the Commission should include this same caveat in the Communications Marketplace Report.

More fundamentally, the Report's methodology fails to consider other important factors beyond the number of potential providers that impact broadband availability and adoption. For example, as OTI and other commenters noted, a market's competitiveness is strongly linked to the consumer's ability to switch providers. In the broadband market, these switching costs are notably high and limit a consumer's ability to change service if they even have an alternative. The Report fails to assess this critical factor in any meaningful way. The report also fails to address whether providers are improving service or lowering prices—both of which are hallmarks of a competitive market.<sup>2</sup>

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<sup>1</sup> New America's Open Technology Institute Comments, WC Docket No. 11-10 (Oct. 10, 2017); New America's Open Technology Institute Comments, GN Docket No. 18-238 (Sep. 17, 2018) ("OTI 2018 Section 706 Comments") at 6-10; New America's Open Technology Institute, Institute For Local Self-Reliance, National Association of Telecommunications Officers and Advisors, National League of Cities, and Next Century Cities Comments, GN Docket No. 18-231, WC Docket No. 18-141, GN Docket No. 17-142 (Aug. 17, 2018) ("OTI et al. Fixed Broadband Competition Comments") at 3-8.

<sup>2</sup> Government Accountability Office, "Additional Stakeholder Input Could Inform FCC Actions to Promote Competition" (Sep. 2017), *available at* [www.gao.gov/assets/690/687244.pdf](http://www.gao.gov/assets/690/687244.pdf).

## Flawed Assumptions about Competition

In addition to its methodological flaws, the Report includes misguided and vague assumptions about broadband competition that are equally troubling. Of particular concern is the Report's breathless and baseless assertion that markets with two providers are sufficiently competitive. While there is debate about precisely how many providers are needed in a competitive market, Commenters have long maintained that a market with only two providers is decidedly *not* competitive; the appropriate term for such a market is "duopoly."<sup>3</sup> Duopolies are anticompetitive by definition and do not promote the public interest. The Report ignores this basic economic reality and instead goes even further in asserting that markets with only *one* provider may be sufficiently competitive because of "spillover effects" that are neither defined nor explained. That these assertions have appeared previously in the Commission's Restoring Internet Freedom Order does not make them any more defensible.

For these reasons, the Commission should refrain from adopting the Report as currently drafted.

Respectfully submitted,

/s/ Sarah Morris

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<sup>3</sup> OTI et al. Fixed Broadband Competition Comments; INCOMPAS Comments, GN Docket No. 18-231 (Aug. 17, 2018).